SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1188

JOHN J. KERRIGAN, ET AL.,
PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Questions Presented

1. Are black public school students denied equal protection by school officials who engage in courses of action (including both the adoption of certain measures and the

rejection of others) that are intended to, and do, produce and maintain racial segregation of students and faculty in the system's schools?

2. Should this Court review comprehensive findings of fact which the Court of Appeals found on a voluminous record to be clearly correct (App. 16)?

Statement of the Case

This petition seeks review of findings, concurred in by two lower courts, that the Boston schools are racially segregated in violation of the Fourteenth Amendment. Only issues concerning the existence and scope of this constitutional violation are involved; remedial orders are still pending below.

Both students and teachers are segregated in the Boston public schools. At least 80% of the schools have student racial compositions sharply out of line with the composition of the system as a whole (App. 56).[1] Similarly, over two-thirds of the system's few black teachers are in majority black schools, although less than one-third of the schools are majority black (App. 123).

The District Court (Garrity, J.) found that this segregation was the result of many intentionally segregatory acts by the School Committee (petitioners here) (App. 167), amounting to a "knowing" and "systematic program of segregation" (App. 170). This finding was based on detailed factual analysis (App. 41-161), the testimony of thirty witnesses, and more than 1,000 exhibits (App. 3-4). The Court of Appeals (Coffin, C.J.), after a thorough review of the record (App. 10-33), affirmed the District Court decision and stated that "the district court gave the most deliberate and sensitive attention to this traumatic

[1] Citations to "App." refer to the appendix to the petition.

issue. More pertinently, in the light of the ample factual record and the precedents of the Supreme Court, *we do not see how the court could have arrived at any other conclusion*" (App. 34; emphasis added). These findings that the Fourteenth Amendment was violated in the Boston schools by deliberate segregation echoed similar conclusions reached in more than a dozen Northern cities. See App. 2 n. 1.

Only by reading the opinions of the Court of Appeals (App. 1-34) and District Court (App. 37-173) can the massive, interconnecting evidence of segregatory intent and effect, and the careful treatment it received from the lower courts, be appreciated. Such reading reveals, for instance, that the finding of segregatory intent reached here was supported by actual statements of school officials to an extent unusual in school segregation cases (App. 61, 63-64, 84 n. 19, 102-03, 107-09, 114, 166-67). It also reveals numerous segregatory acts implementing that intent, summarized below in part I(B) of this brief. And it reveals that the petition's statement of facts (pp. 7-8) is squarely at odds with the findings when it asserts that petitioners made no segregatory district changes (compare App. 19, 73 & n. 61, 81), that the majority of petitioners' changes in feeder patterns have been integrative (compare App. 87-104), and that Brighton is politically isolated from Boston (Compare App. 53, 155-57, and especially 156 n. 47). No more reliable are the suggestions that petitioners have been absolved by the Massachusetts Supreme Judicial Court of noncompliance with the state's racial imbalance law (petition p. 8; compare App. 44-47), that petitioners had no say in the selection of sites for new schools (petition p. 13; compare App. 13, 65, 84 n. 19, 149, 152, 158-59; Mass. St. 1966, c. 642 sec. 4), and that the petitioners' student transfer policies encompassed no affirmative segre-

gatory act (petition, p. 25; compare App. 105-06, 108-09, 114-16).

The lower courts' findings coincide with those reached in other cases dealing with the Boston schools. An HEW Administrative Judge, affirmed by the HEW reviewing authority, upheld charges by HEW, HUD and other agencies that the Boston schools are *de jure* segregated in violation of 42 U.S.C. sec. 2000d (App. 48-51). The Massachusetts Commission Against Discrimination found that the school system's "open enrollment" policy was administered discriminatorily on the basis of race, and these findings were upheld by the Superior Court (App. 105-07). And during the School Committee's campaign of delay and obstruction against the Massachusetts Racial Imbalance Act (App. 44-47, 84 n. 19, 160), state courts have made findings (App. 42 n. 3, 46, 69, 70-71) which parallel those of the District Court. The desegregation plan in effect in Boston this year was originally imposed in Massachusetts Supreme Judicial Court proceedings under the Act (App. 44-47) and was adopted by the District Court as part of an interim remedy (App. 174-75).

Summary of Argument

The legal standard followed by both lower courts was precisely the one approved in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), and applied in numerous "Northern" cases relied on by the courts here. Neither court stated or implied, as alleged, that mere failure to relieve "de facto" segregation is unconstitutional (part I(A)). The findings establish "many actions" (App. 167) by school officials with the intent and effect of segregating the Boston schools (part I(B)). The lower courts relied on evidence of refusals to act by the petitioners only insofar as such refusals were found to be part of a more

inclusive segregatory scheme, or tended to rebut petitioners' defense or establish their intent (part I(C)). The petition's challenge to detailed comprehensive findings of fact which the Court of Appeals uniformly approved should not be heard by this Court (part II(A)), and is entirely unfounded (part II(B)).

Argument

I. The Lower Courts Applied the Correct Legal Standard.

A. *The Standard Stated by the Lower Courts Was Correct.*

The Court of Appeals correctly stated (App. 8) that "The controlling test is that propounded in *Keyes*, where the relevant inquiry is described as an effort to determine whether the authorities' 'policies and practices . . . were . . . taken in effectuation of a policy to create or maintain segregation.' 413 U.S. at 213-14." The Court had previously rejected the theory that mere *de facto* segregation not created or maintained by intentional state action must be eradicated. *Springfield School Committee* v. *Barksdale*, 348 F.2d 261, 264 (1 Cir. 1965). At the outset of its opinion in this case it recognized that it was concerned with "a school system segregated by the deliberate design of local school authorities" (App. 4); and it nowhere even intimated that anything less would establish a violation.

Accordingly, the Court considered the "foreseeable racial impact" of School Committee decisions (App. 13, 22); it observed that "the defendants took every opportunity to maintain segregation where it existed and to foster segregation where it did not" (App. 22); and it concluded that "even if the individual instances were not by them-

selves capable of supporting a finding of discriminatory intent — and we think those addressed were sufficient — they clearly create a definite pattern of intentional segregatory motives and practices" (App. 22). And it carefully considered (e.g., App. 6-7, 13, 16, 30) claims that segregatory effects resulted from external causes, or were not intended, or were educationally justified.

The District Court likewise stated the correct legal standard. It defined its task (App. 58) as determining "whether the defendants have intentionally and purposefully caused or maintained racial segregation in meaningful or significant segments of the Boston system". And after meticulous consideration of the facts (App. 58-157) and the law (App. 145, 161-65), it concluded (App. 167) that "the defendants took many actions in their official capacities with the purpose and intent to segregate the Boston public schools and that such actions caused current conditions of segregation in the Boston public schools." The plaintiffs, of course, had not charged that de facto segregation is unconstitutional,[2] but "alleged that the city defendants have intentionally brought about and maintained racial segregation . . . by various actions" (App. 38).

The Court of Appeals' language quoted by the petition (p. 9) does *not* assert that mere de facto segregation is unconstitutional, but simply says that intentional state action *maintaining* a segregated school system is as unconstitutional as such action *creating* it. This was correct: the state's resources and prestige may not be enlisted to preserve segregation even though the segregation may have originated elsewhere. E.g., *Keyes* v. *School District No. 1,* 413 U.S. 189, 199, 211, 214 (1973); *Norwood*

[2] For the purposes of this case, plaintiffs thus make the same concession made in *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973).

v. *Harrison*, 413 U.S. 455, 463-67 (1973); *Robinson* v. *Florida*, 378 U.S. 153, 156-57 (1964); see *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177-79 (1972); *Shelley* v. *Kraemer*, 334 U.S. 1, 13-14, 19-20 (1948); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

The lower courts thus correctly required evidence of state action intentionally creating or maintaining segregation — and, as will appear below (part I(B)), found it in plenty. The petition's claim that, regardless of what the courts said, they in fact held unconstitutional mere failure to remove de facto segregation will be discussed in section I(C) below; all that is asserted here is that both courts below clearly stated the correct constitutional standard.

B. *Numerous Acts Intentionally Creating and Maintaining Segregation Were Found.*

Even a brief summary of the District Court's findings, which the Court of Appeals held to be the only proper ones on this record (App. 34), shows that the District Court did not exaggerate when it concluded (App. 167) that "many actions" intentionally promoting segregation had been proven. Each of the following acts was found by the District Court, and is indistinguishable from segregatory acts relied on by other courts in other cases.

1. The petitioners' assignment practices packed white students into overcrowded white schools rather than placing them in black schools with free space, for reasons which were explicitly racial (App. 59-62). One hundred percent white South Boston High, for instance, was overenrolled by more than 500 students and needed an additional building (App. 59-60, 111) — but the petitioners admitted hundreds of white students from other parts of the city to South Boston High (App. 157). School officials admitted that they continued to admit students to

South Boston High rather than placing them in black schools with vacant seats because they thought that white parents would protest such assignments (App. 61, 81). The defendants had acted against overcrowding when this could be done without reducing segregation but rejected proposals to relieve evercrowding which would have had integratory effects (App. 61-62). E.g., *Booker* v. *Special School District No. 1, Minneapolis,* 351 F. Supp. 799, 808 (D. Minn. 1972).

2. The petitioners placed more than 40 portable classrooms at white schools, thus enabling themselves to continue admitting and assigning white students to those schools, instead of to empty seats elsewhere. School officials hurried along such placement in white South Boston where "there would be no question regarding the racial imbalance question" — but simultaneously rejected proposals to use portables where they would reduce segregation on the ground that relocatables are educationally undesirable and expensive (App. 62-64). E.g., *Keyes* v. *School District No. 1,* 413 U.S. 189, 193, 202 (1973); *Oliver* v. *Michigan Bd. of Educ.,* 508 F.2d 178, 184 (6 Cir. 1974).

3. Of 20 new schools or annexes which the petitioners acquired without State aid and therefore without a requirement of State approval, 18 opened more than 50% black or less than 15% black (App. 64-65). The petitioners systematically located small schools in or near segregated public housing projects, so that the schools were also segregated (App. 148-52). E.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 20-21 (1971); *Milliken* v. *Bradley,* 418 U.S. 717, 726, 738 n. 18 (1974).

4. One of the schools referred to in the previous paragraph, the Weld, was opened only 7% white although located in an overwhelmingly white area: the defendants bused in blacks, without seeking their parents' permis-

sion, without making use of vacant seats in white schools which were at least as conveniently located, and without assigning nearby white students (except visually handicapped students); and this practice stopped only after the present suit was brought and outside officials objected. (App. 65-66.) *Milliken, supra,* 418 U.S. at 725, 738 n. 18; *Clemons* v. *Bd. of Educ.,* 228 F.2d 853 (6 Cir.), *cert. denied,* 350 U.S. 1006 (1956).

5. Even among schools built with State aid, as to which there was heavy State pressure to build integrated schools, the petitioners tried with some success to build segregated schools. (App. 152.) After obtaining State aid by promising to open racially balanced facilities, the petitioners repeatedly failed to adopt feasible ways of reaching that result (App. 66-72). See cases cited in paragraph 3 above.

6. In several instances, involving advanced work classes and the Grover Cleveland School, the petitioners made changes in district lines which promoted segregation (App. 73 & n. 16, 81). E.g., *Keyes, supra,* 413 U.S. at 192, 201; *United States* v. *Board of School Comm'rs of Indianapolis,* 474 F.2d 81, 86 (7 Cir.), *cert. denied,* 413 U.S. 920 (1973). The petitioners had frequently redistricted when this would not reduce segregation. App. 80-81. But they continued to use a districting scheme whose oddly shaped districts made students travel longer distances to segregated schools instead of shorter distances to unsegregated schools, while even schools drawing pupils from the same district varied strikingly in racial composition. App. 74-80. They refused to consider districting changes which would have reduced these segregative features without impairing safety. App. 81-84. When the withholding of State financial aid finally forced the petitioners to agree to redistrict they defaulted on their promise. (App. 84, 87.) E.g., *Milliken* v. *Bradley, supra,* 418 U.S. at 725, 738 n. 18; *Oliver* v. *Michigan Bd. of Educ.,* 508 F.2d 178, 182-84

(6 Cir. 1974); *Cisneros* v. *Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142, 149 (5 Cir. 1972), *cert. denied*, 413 U.S. 920, 922; *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 507-11, 521-22 (C.D. Calif. 1970).

7. The petitioners instituted and repeatedly promulgated feeder pattern regulations which funnelled graduates of black lower schools into three high schools (English, Girls and Burke) which as a result became increasingly and overwhelmingly black, while students were given a variety of options which they exercised to attend white high schools such as South Boston, Charlestown and Hyde Park High. Other feeder patterns created similar results at intermediate level schools. And the petitioners designated several black schools as "middle schools" housing grades 6-8, thus steering their graduates to attend English, Girls and Burke (which were 9-12 grade schools) instead of whiter high schools which started with the 10th grade. App. 87-104. E.g., *Bradley* v. *Milliken*, 484 F.2d 215, 226-27 (6 Cir. 1973), findings as to segregation cited with approval, 418 U.S. 717, 738 n. 18 (1974); *Hart* v. *Community School Bd. of Educ.*, 2 Cir., No. 74-2076 (1/27/75); *Brinkman* v. *Gilligan*, 503 F.2d 684, 695-96 (6 Cir. 1974).

8. The petitioners ran an "open enrollment" transfer program which was discriminatorily administrated,[3] and which implemented not only transfers reducing segregation but those increasing it. After having in 1966, under State pressure, prohibited the latter, segregatory transfers, the petitioners re-instituted such transfers soon afterward with full knowledge of their racial effect, and continued to effect segregatory transfers for five more

[3] At some white schools, transferring black students "encountered locked doors, physical segregation in separate classrooms, auditoriums and corridors and placement in the rear of classrooms. Anticipating the arrival of black students, administrators of some transferee schools had desks unbolted from the floor and removed from classrooms." App. 105.

years. In 1971, State pressure forced the petitioners to abandon this policy, after a lengthy struggle in which the undesirability of forcing white students to stay in black schools was repeatedly invoked by school officials. Even then ways were found to implement segregatory transfers, by means including exceptions to the new policy, constricted readings of the policy deliberately concealed from State officials, and "hardship" transfers granted on feeble or explicitly racial grounds. App. 104-17. E.g., *Milliken, supra,* 418 U.S. 717, 725, 738 n. 18 (optional zones); *Keyes, supra,* 413 U.S. at 202; *Taylor* v. *Bd. of Educ. of New Rochelle,* 294 F.2d 36, 38 (2 Cir. 1961), *cert. denied,* 368 U.S. 940 (1961).

9. More than two-thirds of the school system's few black teachers were assigned to majority black schools, even though less than one-third of the schools were majority black; and the proportion of black teachers so assigned increased over the years. App. 122-24. *None* of the few black principals, assistant principals and assistant headmasters was at a majority white school. App. 124. E.g., *Keyes, supra,* 413 U.S. at 199-200, 202; *Swann, supra,* 402 U.S. at 18-20.

10. Teachers in 80-100% black schools were paid less and averaged less than half the experience of those in 80-100% white schools, and more than twice as many of them were "provisional" teachers considered by the petitioners unqualified for permanent employment; the high rate of teacher turnover in black schools was admitted by school officials to be undesirable. App. 128-32. *Hobson* v. *Hansen,* 327 F. Supp. 844 (D.D.C. 1971); *Spangler* v. *Pasadena City Bd. of Educ.,* 311 F. Supp. 501, 514-15 (C.D. Calif. 1970).

11. Although about 16% of Boston's population was black, and about 33% of the public school students were

black, only 5.4% of the permanent teachers and 3.5% of the administrators employed by the petitioners were black. The petitioners' hiring system relied upon a misuse of the National Teacher Examination against the recommendations of that test's authors and tending to accentuate the tendency (known to school officials) of blacks to do worse on the test than whites. Since appointment to administrative positions was limited to those with many years of Boston teaching experience, those eligible were almost entirely white, so that discriminatory teacher hiring resulted in discriminatory administrator selection. App. 132-35, 137-39. E.g., *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2 Cir. 1972); *Walston* v. *County School Bd. of Nansemond County*, 492 F.2d 919 (4 Cir. 1974).

12. The petitioners ran heavily white high schools offering unique and valuable programs (Boston Latin, Girls' Latin, and Boston Tech), access to which was based on an unvalidated test which admitted between twice and five times as large a proportion of whites as of blacks. The petitioners ran at white high schools (but not at a number of black high schools) particularly valuable vocational programs whose student body and faculty were disproportionately white, and recruitment for which was concentrated at white junior high schools. App. 139-45. E.g., *Berry* v. *School Dist. of Benton Harbor*, 505 F.2d 238, 241-42 (6 Cir. 1974); *Spangler* v. *Pasadena City Bd. of Educ.*, 311 F. Supp. 501, 519-20 (C.D. Calif. 1970).

13. Segregation in the Boston schools was not simply a result of private residential preferences. Housing segregation in Boston was fostered by a variety of government policies, and practices antithetical to a "neighborhood school policy" — such as massive student transportation, schools drawing on the whole system for their students,

and transfer arrangements — pervaded the school system. App. 146-54. E.g., *Keyes, supra,* 413 U.S. at 211-13.[4]

C. *The Lower Courts' Limited Reliance on School Committee Refusals to Act Was Proper.*

The petition's assertion (pp. 8-10) that the lower courts' finding of unconstitutional segregation was based on mere refusal to relieve de facto segregation is incorrect. The courts enunciated no such standard (part I(A) above) and relied on ample evidence of segregatory action (part I(B) above). The petition, indeed, treats as "inaction" practices which the lower court findings show to be anything but that: the placing of portable classrooms at white schools instead of schools where they would have a less segregative effect (petition, pp. 12-13; App. 12, 62-64), the repeated promulgation for segregatory purposes of a transfer policy allowing segregative transfers as well as integrative and neutral ones (petition, pp. 25-26; App. 16-19, 104-17), and teacher assignment policies resulting in teacher segregation (petition, pp. 27-28; App. 28-30, 122-28). The petition's treatment of these and other areas is explicable only on the erroneous theory that state action designed to maintain segregation or implement the segregatory preferences of teachers (who are state agents) and parents is constitutional.

The lower courts did (like other courts considering "Northern" school segregation cases) rely on the petitioners' refusal to act for several specific and wholly proper purposes.

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[4] In the nineteenth century, Boston led the way in departing from the neighborhood school policy, ironically in the context of promoting segregation. *Roberts* v. *City of Boston*, 59 Mass. (5 Cush.) 198, 208-09; M. Weinberg, *Race and Place: A Legal History of the Neighborhood School* 2-7 (1967).

1. Where the petitioners asserted as a *defense* that they had taken measures to integrate schools, the courts rightly investigated whether this was so or whether the petitioners' programs had been all talk and no action. Thus, petitioners have claimed here and below (petition, p. 5; App. 39) that they tried to integrate the Boston schools and could have done no more without violating the Massachusetts Racial Imbalance Act. The District Court properly made findings on these claims, concluding that on the contrary the petitioners persistently struggled to avoid the relief of racial imbalance directed by the Act and that their acts of compliance were insignificant and compelled by outside financial pressure (App. 47-48, 62, 81-87, 152); it is these findings that the petition now attacks (pp. 12, 14-17) as improperly relying on mere inaction. Similarly, the District Court's finding (App. 135-37) that the petitioners' minority recruitment program was a mere pretense—a finding which the petition (pp. 31-32) attacks as reliance on inaction— was among other things a response to the petitioners' own reliance on their recruitment program as a defense against charges of hiring discrimination. City Defendants' Requested Findings of Fact, pp. 25-32 (3/12/73).

2. The lower courts properly relied (e.g., App. 9) on School Committee refusal to act as evidence of the *intent* underlying actions which the Committee did take. Thus, the refusal of the petitioners to place portable classrooms where they would desegregate on the ground that portables are "educationally undesirable" cast illuminating light on their simultaneous eagerness to acquire 45 portables for placement at white schools so as to avoid any need to assign white students to black schools (App. 62-64). The same is true of the petitioners' refusal even to consider desegregative redistricting although they redistricted for segregative and other purposes (App. 80-87).

3. It was eminently proper to consider inaction as part of a "*pattern* of selective action and refusal to act" (App. 13; emphasis added). Creation or preservation of segregation by such a pattern is exactly what is meant by "practices . . . taken in effectuation of a policy to create or maintain segregation" (*Keyes*, 413 U.S. at 214), and is plainly unconstitutional. See *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964) (schools not opened in desegregated county but opened elsewhere); *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) (busing not authorized for desegregation but authorized otherwise); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886); *Hawkins* v. *Town of Shaw*, 437 F.2d 1286, 461 F.2d 1171 (5 Cir. 1972) (municipal services not provided to black areas but provided to white ones). It is precisely by applying seemingly neutral policies selectively and inconsistently—by reiterating practices where they have preserved segregation, and by revising them where they have not—that school officials can intentionally promote segregation.

Here, for instance, the petitioners refused to consider expert redistricting proposals (App. 81-84), even though the existing, irregularly shaped districts maximized segregation and could not be defended as minimizing home-to-school distances or safety problems (App. 74-78), even though redistricting which preserved segregation had been approved (App. 73, 80-81), even though various practices ignored district lines altogether with segregative results (App. 53, 65-66, 77-80, 110, 141, 152-53, 156-57), even though a state statute required desegregative redistricting (App. 81),[5] and even though the petitioners themselves agreed

[5] This statute obviously prevents the petitioners from relying on a policy of standing pat as a nonracial justifying factor, even were such a policy consistent with their other behavior and otherwise compelling.

(under pressure from state officials) to redistrict (App. 85-87). Surely this is precisely the kind of manipulation of a neighborhood school policy (see *Keyes,* 413 U.S. at 412), by selective action and inaction promoting segregation, which courts have properly condemned. *Bradley* v. *Milliken,* 484 F.2d 215, 222 (6 Cir. 1973), findings of segregation upheld, 418 U.S. 717, 725, 738 n. 18 (1974); *Oliver* v. *Michigan State Bd. of Educ.,* 508 F.2d 178, 182-84 (6 Cir. 1974); *Hart* v. *Community School Bd. of Educ.,* 2 Cir., No. 74-2076 (1/27/75); *United States* v. *School District No. 151,* 432 F.2d 1147 (7 Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *Cisneros* v. *Corpus Christi Ind. School District,* 467 F.2d 142, 149 (5 Cir. 1972), *cert. denied,* 413 U.S. 920, 922 (1973); *Hobson* v. *Hansen,* 269 F. Supp. 401, 412-19, 499-501 (D.D.C. 1967), *aff'd,* 408 F.2d 175 (D.C. Cir. 1969); *Spangler* v. *Pasadena City Bd. of Educ.,* 311 F. Supp. 501, 507-12 (C.D. Calif. 1970); *Soria* v. *Oxnard School Dist. Bd. of Trustees,* 386 F. Supp. 539 (C.D. Calif. 1974); see *United States* v. *Bd. of Educ., Tulsa,* 429 F.2d 1253, 1258-59 (10 Cir. 1970).

In sum, the lower Courts stated the correct constitutional standard, carefully applied it to a record brimful with state action intentionally creating and maintaining segregation, and relied on failure to act only in limited and clearly proper ways. Such a case presents no grounds for review by this Court.

II. The Petition's Challenges to the Factual Findings of the Lower Courts Do Not Merit Review.

A. *Review of Factual Findings Concurred In By Two Courts Is Particularly Inappropriate Here.*

Notwithstanding its protestation to the contrary (p. 34), the petition consists mainly of quarrels with the findings of fact made and affirmed below. Thus, the petition dis-

cusses at length (pp. 18-24) Judge Garrity's findings (App. 87-104) that the purpose and effect of feeder pattern changes was segregative, findings which Chief Judge Coffin termed "clearly correct" (App. 16). The petition also asks this Court to review findings concerning a committee (p. 17), the causes of teacher segregation (pp. 27-28), the details of the teacher hiring system (pp. 30-31), and other matters.

This case is a peculiarly inappropriate one for departing from this Court's great reluctance to review findings of fact concurred in by two lower courts. E.g., *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967). The District Court's findings (App. 41-170) are unusually comprehensive and painstaking, and are based on voluminous evidence thoroughly explored at trial.[6] The Court of Appeals' discussion (App. 1-34) was similarly thorough. That Court pointedly went beyond a simple holding that the District Court findings were not clearly erroneous to commend Judge Garrity's "most deliberate and sensitive attention" (App. 34) and to say that "in the light of the ample factual record and the precedents of the Supreme Court, we do not see how the court could have arrived at any other conclusion" (App. 34). The District Court findings, moreover, coincide with those of two administrative agencies and several state court decisions (see Statement of the Case, *supra*).

B. *The Petition's Factual Arguments Were Properly Rejected Below.*

While space does not permit full exposition here of the gaps and errors in the petition's factual claims, a brief summary (consisting mainly of references to the lower

[6] Petitioners' lead trial counsel (James D. St. Clair) was experienced and vigorous, as are their present counsel.

courts' careful analysis of the same claims) may be helpful.

Overcrowding and portable classrooms. Many white schools were overcrowded and many black ones had space; for explicitly racial reasons, school officers rejected reassignments and busing (which they had used in other situations) and instead placed portable classrooms at white schools so that their students could stay out of black schools (App. 58-64). The petition argues that this was only "maintenance or perpetuation of existing de facto segregation" (p. 13)—but such perpetuation, undertaken for segregative purposes, is plainly unconstitutional.

New construction. Numerous buildings were built so as to be segregated (App. 64-72, 148-50). The petition's suggestion (p. 13) that the petitioners did not approve school sites and could not predict the residential composition of their neighborhoods is simply wrong (App. 13, 65, 84 n. 19, 149, 152, 158-59; Mass. St. 1966, c. 642, sec. 4); the following suggestion (pp. 13-14) that the building of schools so they will open segregated is not "affirmative segregatory conduct" is simply incomprehensible.

Districting and Redistricting. The lower courts did not, as the petition urges (pp. 14-17), rely simply on failure to redistrict to establish a violation. As explained in more detail above (part I(C)), they found an intentionally segregatory pattern of action and refusal to act. "It is beyond dispute that the defendants took every opportunity to maintain segregation where it existed and to foster segregation where it did not." (App. 22). The petition's reference (p. 17) to petitioners' purported integrative plans disregards the District Court's finding that the plans were involuntary and unfulfilled (App. 152, see 66-70). The petition's challenge (p. 17) to half a sentence concerning a committee ignores the context explaining the half-sentence (App. 85-87).

Feeder patterns. The petition's claim (pp. 7, 17-24) that changes in the feeder patterns which channeled students to high schools were, on balance, integrative cannot be refuted in full here; see the District Court's lengthy analysis (App. 87-101). It may suffice to point out that school officials themselves acknowledged the segregative impact of the feeder pattern changes (App. 101-03). English Burke and Girls High Schools were 18.7%, 66.3% and 79% black when the new feeder patterns were first in effect (App. 90-91); they were 81%, over 90% and over 90% black in 1972-73 (App. 101).

Open enrollment. The petitioners repeatedly approved a student transfer policy effectuating segregative transfers as well as integrative ones, and rejected amendments disallowing segregative transfers for the reason that under it white children would be "chained to their seats" in "evenly balanced" schools (App. 104-09). The policy was discriminatorily administered, black students who sought transfers to white schools being discouraged and sometimes greeted by locked doors, removed desks, and segregation in separate rooms (App. 105-07). When forced to relinquish this policy, the petitioners kept on implementing segregative transfers under various loopholes (App. 109-17). The petition's argument (p. 25) that this history "discloses no affirmative segregatory act" is simply inconsistent with the facts.

Faculty segregation and unequal education. Black teachers and administrators were concentrated in black schools (App. 122-28); so were inexperienced teachers, white and black (App. 128-32). The petition's suggestion (pp. 27-28) that this is attributable to collective bargaining agreements ignores the fact that teacher transfer rights long antedate collective bargaining (App. 120), and ignores the law that school administrators and teachers—all of them agents of the state—cannot legalize segregation by

contracting among themselves.[7] And the suggestion (pp. 28-29) that assignment of inexperienced teachers to black schools may have been counterbalanced by other practices benefitting those schools ignores that no evidence of any such practice was submitted by petitioners when they had the chance.

Teacher Hiring. Rank on the Boston hiring lists correlates almost perfectly with scores on the National Teacher Examination, which is thus the heart of the hiring system (App. 133-34). Since blacks do worse on the Examination than whites, they are eliminated disproportionately (App. 135) and are employed in a proportion far less than the percentage of blacks in Boston (App. 132-33). This was a prima facie case of hiring discrimination. E.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n. 14 (1973); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2 Cir. 1972); *United States* v. *Texas Educational Agency*, 467 F.2d 848, 868, 873 (5 Cir. 1972). This case was not rebutted by any showing that the Examination or the hiring system as a whole validly predicted job performance (App. 32, 133-34); on the contrary, the Examination's own maker condemns its use in the manner in question here (App. 134-35). The Court of Appeals for the First Circuit therefore joined two such Courts in striking down (App. 31-33) improper use of this Examination. *Walston* v. *County School Bd. of Nansemond County*, 492 F.2d 919 (4 Cir. 1974); *Baker* v. *Columbus Municipal Separate School Dist.*, 462 F.2d 1112

[7] Teacher segregation resulted not only from voluntary teacher transfers but also from explicitly racial assignment by administrators (App. 125). The assertion that this was meant to provide black students with black "role models" was rejected by the District Court as an afterthought (App. 126-27), and would in any event not justify teacher segregation. E.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-20 (1971); *Smith* v. *Bd. of Educ. of Morrilton School Dist. No. 32*, 365 F.2d 770, 781-82 (2 Cir. 1966) (Blackmun, J.).

(5 Cir. 1972). The petition's argument (pp. 30-31) that other factors besides the Examination were considered by the hiring system cannot survive the finding (App. 134) that as a practical matter hiring depended on the Examination because nearly everyone received about the same score on the other factors.

Promotion. Since only teachers employed in Boston for many years could become administrators, and since hiring discrimination hindered blacks from becoming teachers, blacks were likewise discriminatorily excluded from competition for administrative posts (App. 122, 137-38).[8] The petition's assertion that the requirement of Boston teaching experience was not found to be discriminatory is wrong (App. 31, 33, 138); the assertion (p. 29) that, once the discriminatory hurdle was passed, there was no finding that the rest of the system added more discrimination is correct (App. 31 n. 25), but irrelevant. E.g., *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294, 300-01 (6 Cir. 1974).

Examination Schools and Vocational Programs. In dealing with the three examination schools and six vocational programs the lower courts followed the burden-shifting principle of *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). *Keyes* provided two bases for findings of segregation as to these parts of the system. First, since these parts were not "separate, identifiable and unrelated units" unaffected by segregatory practices in other schools (App. 25 & n. 20, 154-57), it was proper to conclude that their segregation was part of a city-wide dual system. *Keyes*, 413 U.S. at 203. Second, the petitioners did not rebut the presumption (*Keyes*, 413 U.S. at 208, 210) that segregation in these parts resulted from the same segregatory intent proven

[8] Suspension of this system in 1970 did not improve matters: 30 persons, all white, were given acting administrative appointments (App. 138-39).

elsewhere (App. 26, 140). Indeed, there was affirmative evidence of segregatory acts at these schools and programs, including discriminatory recruitment and preparation, an unvalidated entrance test for the examination school on which whites succeeded two to six times more frequently than blacks, and white faculties (App. 25 n. 20, 26-27, 73 n. 16, 140-45). The petition (pp. 32-34) argues that resort to *Keyes* was inappropriate because there was not sufficient evidence of intentional segregation in a "meaningful portion of a school system". *Keyes*, 413 U.S. at 208. But—even were some of the petition's unfounded claims as to other findings accepted—the massive findings here were far more than needed to bring the *Keyes* rules into operation. *Keyes*, 413 U.S. at 191, 199 n. 10, 208 (segregative acts at 8 out of 119 schools, plus teacher segregation, is sufficient to support presumption that segregated schools throughout the system were intentionally segregated); *Brinkman* v. *Gilligan*, 503 F.2d 684 (6 Cir. 1974); *Berry* v. *School Dist. of Benton Harbor*, 505 F.2d 238 (6 Cir. 1974); see *Kelly* v. *Guinn*, 456 F.2d 100 (9 Cir. 1972), *cert. denied*, 413 U.S. 919; *Cisneros* v. *Corpus Christi Ind. School Dist.*, 467 F.2d 142, 149 (5 Cir. 1972), *cert. denied*, 413 U.S. 920, 922 (1973); *Davis* v. *School Dist. of Pontiac*, 443 F.2d 573 (6 Cir. 1971).

Conclusion

For almost two decades,[9] this Court has declined to resift factual findings of segregation by lower federal courts. Decisions like this one arouse strong feelings—as do the District Court's remedial orders, of which review here will

[9] See *Clemons* v. *Board of Educ.*, 228 F.2d 853 (6 Cir.), *cert. denied*, 350 U.S. 1006 (1956); *Taylor* v. *Board of Educ.*, 294 F.2d 36 (2 Cir.), *cert. denied*, 368 U.S. 940 (1961); cases cited App. 2 n. 1.

undoubtedly also be sought. But for this Court to involve itself for that reason in review of complex facts and voluminous records would impose a great burden with no corresponding benefit. There is no conflict here among the Courts of Appeals, and no question of law meriting this Court's attention. All that is involved is application of well settled principles to the facts of a single case, more than two decades after de jure segregation was held unconstitutional by the Court. It is easy to argue (petition, pp. 34-35) that review on the merits by this Court would help abate any unrest now existing, and just as easy to reply that acceptance of this case for review by the Court would only lengthen the uncertainties which a denial of certiorari would help set at rest. Neither consideration should control. The lower courts here had the advantage of this Court's recent decision in *Keyes* v. *School Dist. No. 1,* 413 U.S. 189 (1973). They conducted a careful analysis of the immense record before them, reaching results which are not "clearly erroneous" (Fed. R. Civ. P. 52) but clearly correct. No issue has been raised warranting further review, and certiorari should be denied.

Respectfully submitted,

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